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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES HERBERT RUSSELL,

Defendant and Appellant.

D043056

(Super. Ct. No. SCS171136)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

A jury convicted Charles Herbert Russell of battery by a prisoner on a nonprisoner. (Pen. Code, § 4501.5.)<sup>1</sup> In a bifurcated hearing, the court found Russell had six prior "strike" convictions. (§§ 667, subds. (b)-(i), 1170.12, 668.) It denied a motion to dismiss five of the strike convictions and sentenced Russell to prison for 25

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<sup>1</sup> All statutory references are to the Penal Code.

years to life, with the sentence to be served consecutively to the term he was then serving. On appeal, Russell contends (1) the trial court erred in refusing to dismiss his strike convictions; and (2) his 25-year-to-life prison sentence constitutes cruel and unusual punishment. For reasons we shall discuss, Russell's claims are without merit. Accordingly, we affirm.

## I

### FACTUAL AND PROCEDURAL HISTORY

Russell was serving a 40-year prison term at R.J. Donovan Correctional Facility for his 1993 convictions of three counts of forcible oral copulation (§ 288a, subd. (c)), forcible rape (§ 261, subd. (a)(2)), forcible penetration (§289, subd. (a)), and assault with the intent to commit rape (§ 220). While imprisoned, he consulted with a civilian female teacher working at the prison, stating he wanted to get a high school diploma. She advised him she did not handle high school diplomas and he would have to return to speak with another person. Appellant then stated he wished to obtain a G.E.D. certificate, a program for which the teacher was responsible. The teacher informed appellant he would have to pre-test and suggested he provide her with his name and California Department of Corrections number. Russell took a pencil from the teacher's desk, tore a page from a calendar and provided her the information. He then went behind the teacher's desk, held the pencil to her neck and told her he was a "lifer," had nothing to lose, and would kill her if she pressed her beeper (a personal alarm). The teacher pressed her beeper and officers responded. The teacher testified she was so traumatized by the incident that she was unable to work.

## II

### DISCUSSION

#### A

*The Trial Court Did Not Abuse Its Discretion in Refusing to Dismiss  
Appellant's Strike Convictions under the "Three Strikes" Law*

A trial court may, in furtherance of justice, dismiss an allegation or vacate a finding that a prior serious or violent felony conviction qualifies as a strike under the Three Strikes law. (§1385, subd. (a).) When asked to dismiss such a conviction, the trial court must impartially exercise its discretion, reviewing "whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed to be outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

On appeal, we review the court's ruling under the abuse of discretion standard. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 314 (*Gaston*), citing *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.) Under that standard, an appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to dismiss one or more strike convictions. Where the record demonstrates the trial court balanced the relevant factors and reached an impartial decision in conformity with the spirit of the

law, we affirm the trial court's ruling, even if we might have ruled differently in the first instance. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

At the sentencing hearing, Russell's counsel made a motion to dismiss all but one of his strike convictions. He argued that while his client committed "a rather egregious crime" in the past, "somebody who commits a very serious offense during one episode in his life for a period of two days or one day does not need to serve 25 years to life if he commits another offense eleven years later." Further, counsel argued but for his client's criminal past and the fact that the current crime occurred in prison, probation would be appropriate.

The trial court denied the motion, stating it had looked at all the various factors raised by defendant's counsel and nevertheless found them to be insufficient to warrant striking the offenses. The court then specifically mentioned it found defendant's prior strike convictions true; the prior offenses were serious in nature; the victims of defendant's previous crimes were young, and as the result of those incidents would carry emotional scars for the rest of their lives; and while appellant did not use a gun or knife to commit the current offense, he used a pencil as a weapon and the victim was psychologically traumatized.

On appeal, Russell contends the trial court abused its discretion in not dismissing his strike convictions because all six strike priors were committed by appellant during a single period of aberrant behavior; five of the six were committed on the same occasion with the same victim; his first victim was not beaten or repeatedly injured for a long period of time; his second victim fought back and ultimately the assault was thwarted;

and the victim in the current offense was not sexually assaulted nor physically injured. He also argues he did not testify at trial due to the potential for impeachment with his six convictions for sexual assault. We determine Russell has not sustained his appellate burden of showing the trial court's exercise of its discretion in ruling on the motion to dismiss the strike conviction was irrational or arbitrary.

Russell's history of lawbreaking began at 13 or 14 years of age, when the juvenile court entered a true finding for petty theft. (§ 488.) When he was 16, the court entered a true finding for possessing a check with intent to defraud. (§ 475a.) Several months later, he was placed in a group home and charged with assault with intent to commit rape, false imprisonment, and sexual battery. He had pulled the hair of a 17-year-old girl and pushed her head against his penis for self-gratification. He threatened to hurt the girl if she tried to leave and did not comply with his wishes. When he was 17, the court convicted Russell of three counts of forcible oral copulation, forcible rape, forcible penetration, and assault with intent to rape. Brandishing a knife, he had gone to the home of a 15-year-old girl and raped, sodomized and orally copulated her. The next day, brandishing a knife, he went to the home of a 16-year-old girl and attempted to force her comply with his sexual demands. Russell was serving a 40-year prison term for these crimes when he committed the current offense in which he attacked a woman using a pencil as a weapon. Russell told his victim that he was a lifer, had nothing to lose, and would kill her. The victim suffered severe psychological trauma as a result of the incident.

Given appellant's history and the circumstances of his present and prior serious and violent felonies, the trial court acted within its discretion in finding Russell did not fall outside the letter or spirit of the Three Strikes law. On this record, we determine the trial court properly and impartially balanced the relevant factors and did not err in refusing to dismiss appellant's strike convictions.

## B

### *The Trial Court's Sentence Does Not Constitute Cruel and Unusual Punishment*

Appellant does not contend the Three Strikes law is invalid on its face or that an indeterminate sentence of any length constitutes cruel and unusual punishment. Instead, Russell asserts given the unique facts of this case, the constitutional prohibition against cruel and unusual punishment is violated by the *particular* indeterminate sentence imposed.

Cruel and unusual punishment is prohibited by the Eighth Amendment of the United States Constitution and by article 1, section 17 of the California Constitution. Punishment is cruel and unusual if it is so disproportionate to the crime for which it is imposed that it shocks the conscience and offends fundamental notions of human dignity. (See *Ewing v. California* (2003) 538 U.S. 11, 22 (*Ewing*); *In re Lynch* (1972) 8 Cal.3d 410, 424 ).

Appellant acknowledges "[i]t is not cruel and unusual punishment to enhance the penalty for a crime because the defendant is a recidivist, as long as the ultimate punishment, all facts considered, is not disproportionate to the crime" He then argues that given the punishment specified for more serious crimes, a 25-year-to-life sentence

for a third strike conviction of battery by an inmate upon a nonprisoner is disproportionate to the crime committed and constitutes cruel and unusual punishment.

A similar argument was raised and dismissed in *Ewing, supra*, 538 U.S. 11. Ewing was convicted of grand theft for stealing three golf clubs worth more than \$400. The felony conviction, classified as a third strike offense by the California Legislature, was Ewing's third such conviction. The trial court sentenced Ewing under the Three Strikes law to 25 years to life in prison. Ewing appealed contending, in part, that his sentence constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution. In rejecting the challenge, the United States Supreme Court recognized that it traditionally deferred to the state legislatures to adopt a penological theory and to determine the length of sentences. (*Ewing*, at p. 25.) The high court noted that "[w]hen the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice." (*Ibid.*) Similarly, in *Lockyer v. Andrade* (2003) 538 U.S. 63 the high court upheld the 25-year-to-life sentence under the Three Strikes law of a recidivist defendant convicted of shoplifting videotapes worth less than \$153 with a prior theft conviction.

The California Legislature classified violations of section 4501.5 (battery by a prisoner on a nonprisoner) as a felony and as a third strike. Appellant's argument that conviction of other more serious crimes carries a lighter indicated sentence than does a conviction of section 4501.5 when the offense is a defendant's third strike and therefore

that appellant's ultimate sentence is disproportionate to the crime committed and constitutes cruel and unusual punishment, was rejected in *Ewing* and *Andrade*. We similarly reject the challenge and affirm the judgment.

III

DISPOSITION

The judgment is affirmed.

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IRION, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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O'ROURKE, J.